Date: May 12, 1995

Case No. 94-STA-53

In the Matter of:

VINCENT HATCHER

Complainant,

v.

COMPLETE AUTO TRANSIT

Respondent.

APPEARANCES:

Vincent Hatcher, Pro se
Dearborn, Michigan
For the Complainant.

John W. Ester, Esq.
Matheson, Parr, Schuler, Ewald, Ester & Jolly
Troy, Michigan
For the Respondent.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 [hereinafter referred to as "the Act" or "STAA"], 49 U.S.C. § 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

STATEMENT OF THE CASE

The Complainant, Vincent Hatcher [hereinafter referred to as "the Complainant"], filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor on June 6, 1994, alleging that the Respondent, Complete Auto Transit [hereinafter referred to as "the Respondent"], discriminated against him in violation of section 405(b) of the Act. The

Complainant contends that he was discharged due, in part, to his refusal to drive during unsafe weather conditions. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and on September 9, 1994, determined that the Complainant failed either to meet the 180 day reporting period required under STAA section 405(c)(1) or produce a justification to toll the filing requirement, and accordingly dismissed the Complainant's complaint. (AX 1)[1]

The Complainant filed objections to the Secretary's findings by way of a letter of September 19, 1994 and requested a hearing before an Administrative Law Judge. (AX 2) The undersigned Administrative Law Judge issued an Order to Show Cause why the complaint should not be dismissed as untimely. (AX 4) The Complainant responded by way of letter of October 16, 1994 wherein he alleged that he did not know that his refusal to drive during unsafe weather conditions on February 16, 1993 would be used against him regarding his discharge of July 7, 1993. Therefore, I found that the Complainant raised a genuine issue of material fact concerning whether the Respondent concealed or misled the Complainant regarding the grounds for his discharge. 29 C.F.R. § 1978.102(d)(3). If fully credited, the grounds for discharging the Complainant could justify the tolling of the statutory filing period. Thus, by way of an Order of October 27, 1994, I ordered that this matter proceed to hearing.

A formal hearing was conducted on January 10, 1995 in Oak Park, Michigan with both parties being afforded full opportunity to present evidence and argument.

ISSUES

1. Whether the Complainant produced a justification to toll the filing period for complaints under the STAA.

2. Whether the Complainant was discriminated against by the Respondent as a result of having engaged in an activity protected under the STAA.

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

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[1] In this Recommended Decision and Order, "AX" refers to Administrative exhibits, "CX" refers to Complainant's exhibits, "RX" refers to Respondent's exhibits, and "Tr." refers to the Transcript of the hearing.

FINDINGS OF FACT

The Complainant commenced his employment with the Respondent in May 1977 as an over-the-road commercial tractor/trailer operator. (Tr. 43) The Respondent, as well as its corporate ancestry, is a business engaged in interstate and intrastate trucking operations and maintains a place of business in Pontiac, Michigan. (AX 1) In the regular course of business, Respondent's employees operate commercial motor vehicles principally to transport consumer products. Id. Most recently, the Complainant served as a local board driver who transported automobiles on short runs of approximately 100 miles or less. (Tr. 48) Most drivers preferred local board positions because the driver would always finish his day's work in Pontiac and not somewhere on the road as would over-the-road drivers. (Tr. 49) Consequently, such positions were assigned based on seniority. Id. The Complainant served as a local board driver from 1989 until his discharge on July 7, 1993. Id.

The Complainant testified that over the course of his 17 years working for the Respondent he received various letters of warning from the Respondent concerning such items as: loose chains on his truck, parking his truck in an improper spot, having an accident and failing to keep his driver's log up-to-date. (Tr. 45) The Complainant explained that such warnings are common occurrences with all drivers and that none of the above instances ever resulted in a threat of discharge. Id.

The gist of the Complainant's case revolves around the events of February 16, 1993 and July 1, 1993. On February 16, 1993, upon waking, the Complainant observed falling snow and heard weather reports of additional snow. He telephoned the Respondent's place of business and informed them that he would not report to work that day. The Complainant talked with Russell Pett, Supervisor of Operations for the Respondent. (Tr. 163) Pett questioned the Complainant's decision and informed him that the weather was not bad in Pontiac and that other drivers had reported to work. Id. Thereafter, the call was somehow disconnected and the Complainant had no further contact with the Respondent that day. Id. After the call, Pett shipped the load scheduled for the Complainant and also put a disciplinary notice in the Complainant's personnel file regarding his refusal to report to work. The disciplinary notice placed in the Complainant's file referenced Article 40 of the union agreement which deals with refusals to work. (Tr. 164) No evidence was presented of any other relevant incidents concerning any employment related problems between February 16, 1993 and July 1, 1993.

On July 1, 1993, the Complainant reported to work at approximately 6:30 A.M. and delivered a load to New Boston, Michigan approximately 38 miles from Pontiac. (Tr. 59-60) The Complainant returned to the terminal in Pontiac at approximately 11:00 A.M. and

had his truck reloaded. (Tr. 60) The Complainant then spoke to William Smith, the dispatcher, and requested more loads as the Complainant was paid by the load. (Tr. 62) Mr. Smith informed the Complainant that he needed to complete his paper work, i.e., drivers' logs, for June before he could get any more loads. Id. During his conversation with Mr. Smith, the Complainant also informed him that he had to attend to some personal business[2] that afternoon and therefore could not deliver another load to New Boston until later that evening or perhaps the next work day. (Tr. 63)

Soon thereafter, as the Complainant sat in the drivers' lounge completing his paper work, he was observed by Denny Dale, Terminal Manager for the Respondent. (Tr. 51; 143) Mr. Dale had seen that the Complainant's truck was loaded in the yard and asked the Complainant why he was not in the process of delivering it. (Tr. 143) The Complainant informed Dale that he had personal business to complete. (Tr. 66) The Complainant did not inform Mr. Dale that he was working on paper work pursuant to Mr. Smith's instructions. (Tr. 66-67; 143) Approximately one hour later, at about 1:00 P.M., Mr. Dale returned to the drivers' room and again saw the Complainant. (Tr. 143) Mr. Dale then requested that the Complainant come into the dispatch area to talk with Dale and Bob Skinner, the Operations Manager for the Respondent. (Tr. 50; 144) The Complainant testified that he requested that a union representative be present to witness the meeting, but was refused. (Tr. 51) At the meeting, Dale ordered the Complainant to take the load to New Boston as required by the work rules which specified that two loads be completed each day. (Tr. 144; RX 2) The Complainant told Mr. Dale that he had personal business and that he could not deliver the load that day. Id. Mr. Dale allegedly told the Complainant that "I don't care what you have" and declared that the load would be delivered by another driver if the Complainant continued to refuse. (Tr. 52; 144) The Complainant responded that if Mr. Dale had another driver complete his load then the Complainant would "have his ass." (Tr. 53; 144) Mr. Dale later saw the Complainant in the drivers' room discussing the personal business he had that afternoon in the Flint area. (Tr. 145) Mr. Dale had no further contact with the Complainant on July 1, 1993.

On July 2, 1992, the Complainant reported to work and found that his truck was unloaded. (Tr. 73) Because it was too early to have another load dispatched, the Complainant returned home and later telephoned the Respondent's office to inform them that he would not report to work that day. (Tr. 73-74) The Complainant testified that he did not return to work on July 2, 1993 because he was too emotionally upset to have another confrontation with Mr.

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[2] Complainant's personal business consisted of depositing funds in his credit union in Flint, Michigan so that his daughter could purchase an airline ticket to fly to Flint that evening. (Tr. 64)

Dale. (Tr. 74-75) The Complainant was not scheduled to work on Saturday July 3, Sunday July 4, or Monday July 5, which was a legal holiday. (Tr. 79) The Complainant reported to work at approximately 6:30 A.M. on Tuesday, July 6 and worked nine and one-half hours, completing his required runs. (Tr. 81-82) On July 7, the Complainant reported to work at approximately 7:30 A.M. and completed one run that morning. (Tr. 83) At approximately 11:30 A.M., Mr. Pett called the Complainant into the back office and notified him that he was discharged, effective immediately. Id. The determination to discharge the Complainant was made solely by Mr. Dale, who prepared the letter of discharge on the morning of July 7, 1993 and told Mr. Pett to inform the Complainant of his decision. (Tr. 146) Mr. Dale testified that his decision to discharge the Complainant was based on the July 1 incident which he considered to be an authorized work stoppage which is punishable by discharge under Article 40 of the union agreement. (Tr. 146; 157)

Subsequent to his discharge, the Complainant filed a union grievance causing a local level meeting to be held on July 8, 1993 between agents of the Respondent and the Complainant's union. (Tr. 147) The meeting was held with the intent of allowing the Respondent to present evidence and recount the incident so to serve as a fact finding for the union. (Tr. 148) The February 16, 1993 incident was mentioned when discussing the Complainant's work history. Id. Thereafter, on July 27, 1993, the Complainant's grievance was heard before the union's grievance panel which upheld the discharge of the Complainant based on his refusal to work as ordered on July 1, 1993.[3] (Tr. 86; RX 6)

On February 15, 1994, the Complainant filed a complaint with the Michigan Department of Civil Rights alleging that he was discharged because of his race. (CX 6) The Civil Rights Department found no evidence of unlawful discrimination and dismissed the complaint on August 30, 1994. (CX 2) On June 6, 1994, the Complainant filed his complaint with the Department of Labor seeking protection under the whistleblower provisions of the STAA.

CONCLUSIONS OF LAW

Timeliness of the Complaint

Section 405(c)(1) the STAA requires that complaints of discrimination be filed within 180 days of the discriminatory

[3] At the hearing, the Complainant made allegations of insufficient union representation at the grievance proceedings and also that he believed that the Respondent and his union acted in concert to have him discharged. As these matters constitute alleged violations of the National Labor Relations Act, and because the National Labor Relations Board serves as the proper forum for investigation into such matters, I will not discuss them further.

conduct. 49 U.S.C. § 2305(c)(1). The Complainant was discharged on July 7, 1993, allegedly due, at least in part, to the Complainant's refusal to operate his commercial motor vehicle during inclement weather on February 16, 1993. The Complainant filed his complaint on June 6, 1994, 341 days after the termination of his employment and substantially beyond the statutory filing period.

The Complainant testified that he did not know that the February 16, 1993 incident was used as a basis for his July 7, 1993 discharge until he talked with Bob Secrest of the Black Rider Network sometime much later. (AX 5) Among the reasons cited in the STAA's implementing regulations as grounds for tolling the 180 day statute is "where the employer has concealed or misled the employee regarding the grounds for discharge." 29 C.F.R. § 1978.102(d)(3). Although the February 16, 1993 incident was discussed in union grievance hearings immediately following the July 7, 1993 discharge, I find that the Respondent did not give notice that the February 16, 1993 incident might be used against the Complainant to justify the July 7, 1993 discharge. Therefore, I find that the Complainant has produced evidence which requires both a tolling of the statutory filing period and a determination of whether the Complainant was discharged because of activities protected under the STAA.

Applicable Law

Section 405 of the STAA, provides, in pertinent part:

> (b) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from the employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 2305 (Supp. 1994)

To establish a prima facie case of discriminatory treatment under the STAA, the Complainant must prove: (1) that he was engaged

in an activity protected under the STAA; and (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). The establishment of the prima facie case creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

(1) Protected Activity

Under Section 405 of the STAA, a driver's refusal to drive during conditions which the driver considers to present a bona fide danger of injury constitutes a protected activity. 49 U.S.C. § 2305(b). However, the Act offers protection only if a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health resulting from the unsafe condition. Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76 (2nd Cir. 1994). The Complainant testified that he refused to report to work on February 16, 1993 because of heavy snowfall and weather reports of additional snow. The Respondent offered evidence which indicated that other drivers reported to work on February 16, 1993 and delivered their loads. The mere fact that other drivers worked during the inclement weather of February 16, 1993 does not establish that the Complainant's apprehension of driving in such weather was unreasonable. Therefore, because the record indicates that the weather was such that a reasonable person could consider the operation of tractor/trailer to be dangerous, I find that the Complainant's refusal to drive on February 16, 1993 is protected under the STAA. Consequently, the Complainant has established the first element of his prima facie case.

(2) Adverse Employment Action

The Complainant was discharged from his employment on July 7, 1993. No dispute exists that the discharge of the Complainant constitutes an adverse employment action under the section 405(b) of the STAA. Therefore, the second element of the Complainant's prima facie case is established.

(3) Causation

In order to prevail in his claim, the Complainant must prove, by a preponderance of the evidence, that the above-mentioned protected activity and resulting adverse employment action are connected by a causal link. At a minimum, the Complainant must present evidence sufficient to raise an inference of causation. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992). The Secretary of Labor has declared that, in establishing the causal link between the protected activity and the adverse action, proof of the employer's knowledge of the employee's

protected activity is sufficient. See Osborn v. Cavalier Homes, 89-STA-10 (Sec'y July 17, 1991); Zessin v. ASAP Express, Inc., 92-STA-33 (Sec'y Jan. 19, 1993).

The record is clear that the Respondent's Terminal Manager, who ultimately decided to discharge the Complainant, had knowledge of the Complainant's work refusal of February 16, 1993. While the Respondent's knowledge of the Complainant's protected conduct prior to taking adverse action against the Complainant may be sufficient to raise an inference of causation for purposes of the prima facie case, I find no such inference is warranted here. See Etchason v. Carry Companies of Illinois, Inc., 92-STA-12 (Sec'y Mar. 20, 1995)(Respondent's knowledge of protected activity alone does not establish causation element). The lack of proximity between the Complainant's protected activity and the adverse employment action taken against him makes the causal link too tenuous. The Complainant's protected activity occurred in February, almost six months prior his discharge. The record contains no evidence of any other protected activities between February, 1993 and July, 1993, or any other adverse employment actions. Therefore, I find that this lack of proximity breaks the causal chain and as a result, the Complainant cannot rely on the Respondent's knowledge of his past protected conduct to satisfy the causation element of a prima facie case of discrimination under the STAA. Consequently, I find that the Complainant has failed to prove, by a preponderance of the evidence, a prima facie case of discrimination under the STAA.

Rebuttal of the Prima Facie Case

Assuming arguendo that the Complainant satisfied his prima facie case, I nonetheless find that the evidence presented by the Respondent successfully rebuts the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. Carroll, supra. A credibility assessment of the nondiscriminatory reason espoused by the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

The Complainant was discharged on July 7, 1993 after refusing a direct order from his superior, Denny Dale, on at least two occasions on July 1, 1993. The Respondent classified the Complainant work refusal as an "unauthorized work stoppage" and discharged the Complainant in accordance with the Respondent's union agreement. (RX 3) Thus, the Complainant articulated a legitimate, nondiscriminatory reason for the Complainant's discharge and thereby has successfully rebutted the Complainant's prima facie case of discrimination under the STAA.

Pretext

If the employer successfully presents evidence of a nondiscriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. Moon, supra; See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. St. Mary's, supra, at 2752-56.

The Complainant failed to prove, by a preponderance of the evidence, that the Respondent's discharge of him on July 7, 1993 was in any way connected to his work refusal on February 16, 1993. The Complainant's primary evidence supporting his allegation that he was discharged, at least in part, due to his February 16, 1993 protected activity is the fact that the Respondent discussed the February 16, 1993 incident at the union grievance proceedings following the July 7, 1993 discharge. The Respondent contended that the February 16, 1993 discharge was discussed only to the extent that panel requested information on the Complainant's work history. (Tr. 148) The Respondent stated that the February 16, 1993 work refusal was never considered a basis for the July 7, 1993 discharge because the July 1, 1993 incident was grounds for dismissal in itself. (Tr. 147) The Respondent's letter of discharge to the Complainant stated simply that the reasons for discharge were the events of July 1, 1993. (Tr. 146-47; RX 6) Similarly, the union grievance panel found that the Complainant's July 7, 1993 discharge was based solely on his July 1, 1993 actions. (RX 7)

Consequently, I find that the Complainant has failed to offer conclusive evidence that his protected activity of February 16, 1993 was the true reason for his discharge on July 7, 1993, or that the reasons offered by the Respondent were false.

Conclusion

Based on the foregoing, I find that the Complainant has failed to prove, by a preponderance of the evidence, a causal link between his protected activities and any adverse employment action taken against him by the Respondent. Therefore,

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint of Vincent Hatcher be DISMISSED.

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).